No. SC85652

IN THE
SUPREME COURT OF MISSOURI

R.W.,

Appellant,

v.

MICHAEL SANDERS, et al.,

Respondents.

Appeal from the Jackson County Circuit Court
The Honorable Edith Messina, Circuit Judge

BRIEF OF *AMICUS CURIAE* STATE OF MISSOURI

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INTEREST OF *AMICUS CURIAE*

The constitutionality of Missouri's Sex Offender Registration Act, §§ 589.400 to 589.425, RSMo, is challenged by the appellant in this case. The State of Missouri has a strong and inherent interest in defending the constitutionality of its laws. The Attorney General, on behalf of the State, "may . . . appear . . . in any proceeding or tribunal in which the state's interests are involved. § 27.060, RSMo. Further, under Mo. R. Civ. P. 84.05(f)(4), the Attorney General may file an *amicus* brief without consent of the parties.

STATEMENT OF FACTS

The State accepts the Statement of Facts provided by Respondents Sanders and Phillips.

STANDARD OF REVIEW

In this case, the appellant has appealed to obtain review of the a circuit court judgment regarding his claims for declaratory and injunctive relief from a statute claimed to be unconstitutional. This Court recently described the applicable standard of review in such a case as follows:

> The court's judgment in a suit in equity will be affirmed unless there is no substantial evidence to support it, unless it was against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976); *Nothaus v. City of Salem*, 585 S.W.2d 244, 245 (Mo. App. S.D. 1979). Because this case involves statutory interpretation, which is a question of law, this Court's review is *de novo. Ochoa v. Ochoa*, 71 S.W.3d 593, 595 (Mo. banc 2002). Statutes are presumed constitutional. *In re Marriage of Kohring*, 999 S.W.2d 228, 231 (Mo. banc 1999). A statute will not be invalidated "unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution." *Id.*

Conseco Fin. Servicing Corp. v. Missouri Dep't of Revenue, 98 S.W.3d 540, 542 (Mo. banc 2003).

ARGUMENT I

The public accessibility of information under Sex Offender Registration Act (SORA; also known as Megan's Law), §§ 589.400 to 589.425, RSMo, neither conflicts with provisions of § 610.105, RSMo, that close records related to cases resulting in suspended impositions of sentence nor violates procedural or substantive due process.

(A) Public accessibility of certain information that must be provided under SORA, even from a person who received a suspended imposition of sentence following a plea of guilty to a crime requiring registration under SORA, does not conflict with the provisions of § 610.105, RSMo, that close official records related to cases that resulted in a suspended imposition of sentence because SORA specifically mandates public availability of the information notwithstanding any provision of law to the contrary.

R.W. pled guilty to sexual assault in the first degree in 1995 in connection with conduct involving a child. The crime of sexual assault, a class C felony, is now codified at § 566.040, RSMo. Missouri's Sex Offender Registration Act (SORA; also known as Megan's Law), §§ 589.400 to 589.425, RSMo, applies to any person who, since 1979, has been "convicted of, been found guilty of, or *pled guilty to* committing . . . a felony offense of chapter 566, RSMo, or any offense of chapter 566, RSMo, where the victim is a minor . . . . § 589.400.1(1) (emphasis added). Because R.W. pled guilty to an offense set out in this provision, SORA applies to him. As a person to whom SORA applies, R.W. must register with the chief law enforcement official of the county in which he resides. § 589.400.2.

R.W. first contends that the public accessibility of SORA registration information, §§ 589.417 and 43.650, RSMo, conflicts with § 610.105, RSMo, which provides that official records pertaining to a case resulting in a suspended imposition of sentence ("SIS"), subject to certain exceptions, shall be closed records when the case is finally terminated. R.W. did receive an SIS following his guilty plea to the 1995 sexual assault charge and completed his probation term without violation.

Under SORA, registrants' names, addresses, and crimes for which they are registered are available upon request to members of the public. § 589.417. The names, addresses, and crimes of registrants are available to the public "[n]otwithstanding any provision of law to the contrary . . . ." *Id.* Because this statute makes that information available regardless of any other law, the legislature has plainly exempted this information from the statute closing records relating to cases resulting in an SIS. There is no conflict between § 589.417 and § 610.105.

Under the recently enacted 43.650.4, RSMo, registrants' names, addresses, crimes for which they are required to register, and a photograph are to be available to the public on the internet. As just noted, the names, addresses, and crimes of registrants are already specifically exempted from the closure provisions of § 610.105. With regard to the placement of photographs on the internet, that is information that will not be part of the record in any case that resulted in an SIS because the registrant is to supply the photograph at the time of registration. § 589.407(2). Even if a particular photograph used did come from an old case file, it is, of course, no more than a representation of what the registrant looks like and that is

something that is already and obviously open to the public. There is also no conflict between § 43.650 and § 610.105.[1]

The State does not understand R.W. to be asserting that the requirement that he supply other information during SORA registration – information that will be available to law enforcement authorities but not to the public – is inconsistent with the closed record provisions of § 610.105. Even if he is making this argument, it would be unavailing. The information provided by registrants is available to the local law enforcement agency to which the registrant supplied the information and is also forwarded to the Missouri State Highway Patrol. § 589.410. The Patrol is to enter that information into the Missouri Uniform Law Enforcement System where it is to be available to members of the criminal justice system and other entities as provided by law. *Id.* The information provided, other than name, address, and crime, is not open to the public and is to be available only to courts, prosecutors, and law enforcement agencies. § 589.417.1. The records closed under § 610.105 are also specifically accessible for such law enforcement purposes. § 610.120, RSMo. (records closed under § 610.105 shall be available to criminal justice agencies for the administration of criminal

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[1]Section 589.417 itself states that the photographs required to be supplied during registration are to be closed records not generally available to the public. This may conflict with the requirement of § 43.650.4(3) that photographs of SORA registrants are to be available on the internet. As a statute passed at a later date, § 43.650.4(3) would take precedence and authorize public access to the photographs. *Corvera Technologies, Inc. v. Air Conservation Comm'n*, 973 S.W.2d 851, 859 (Mo. banc 1998)

justice); § 43.500 (1), RSMo (defining "Administration of criminal justice" to mean "performance of any of the following activities: detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders"). Thus, SORA and § 610.105 treat records that are to be closed consistently. There is no conflict.

(B) Statutory authorization for public access to certain information that must be provided under SORA, even from a person who received a suspended imposition of sentence following a plea of guilty to a crime requiring registration under SORA and thereby might expect that information related to that crime will not be publicly available, does not result in a deprivation of procedural due process because those rights have been fulfilled by the legislative process.

R.W. next argues that, if SORA does require him to register, SORA violates his due process rights because he made his plea of guilty to sexual assault on the basis of the law at the time that his SIS would be a closed record and not available to the public. R.W. does not state whether he is relying on procedural or substantive due process tenets. Neither basis supports his position.

Procedural due process guarantees do not impose constitutional limitations on the power of legislative bodies to make substantive changes to laws even when those changes might affect the vested interests of a class of individual. *Atkins v. Parker*, 105 S. Ct. 2520, 2529 (1985) (reduction in welfare benefits does not deprive recipients of due process because the reduction was due to legislative action); *Packet v. Stenberg*, 969 F.2d 721, 726 (8th Cir.

1992) (legislature that creates statutory entitlement not precluded from altering or terminating that entitlement by later enactment). When a citizen's interest is the product of legislative creation, that interest is subject to later legislative modification. *Richardson v. State Highway & Transp. Comm'n*, 863 S.W.2d 876, 879 (Mo. banc 1993). In short, when the legislature passes a law, those persons affected by the law have received procedural due process – the legislative process. *Brown v. Retirement Comm. of Briggs & Stratton*, 797 F.2d 521, 527 (7th Cir. 1986) (citing J. Nowak, R. Rotunda, & J. Young, *Constitutional Law* 556 (1983)). R.W.'s procedural due process rights have been fulfilled because the registration and notification provisions of SORA have been enacted through the legislative process.

(C) Public availability of certain information that must be provided under SORA, even from a person who received a suspended imposition of sentence following a plea of guilty to a crime requiring registration under SORA and thereby might expect that information related to that crime will not be publicly available, does not result in a deprivation of substantive due process because SORA's making such information publicly available is rationally related to legitimate state interests.

Although legislative enactments are not subject to procedural due process challenges, those enactments must be compatible with substantive constitutional guarantees *Brown v. Retirement Comm. of Briggs & Stratton*, 797 F.2d 521, 527 (7th Cir. 1986) (citing J. Nowak, R. Rotunda, & J. Young, *Constitutional Law* 556 (1983)). But R.W.'s substantive due process challenge to SORA also fails.

No interference with fundamental rights or burden on a suspect class. In analyzing substantive due process claims, a court must first determine whether the government action interferes with fundamental rights or burdens a suspect class. *In re Marriage of Woodson*, 92 S.W.3d 780, 783 (Mo. banc 2003); *Casualty Reciprocal Exchange v. Missouri Employers Mut. Ins. Co.*, 956 S.W.2d 249, 256 (Mo. banc 1997). If a law interferes with a fundamental right or burdens a suspect class, then it must be narrowly tailored to serve a compelling state interest. *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1419 (1990); *Deaton v. State*, 705 S.W.2d 70, 73 (Mo. App. E.D. 1985). R.W. here does not assert a burden on any suspect class. He does assert interference with his fundamental rights.

Fundamental rights derive only from the United States Constitution. *San Antonio Indpt. School Dist. v. Rodriguez*, 93 S. Ct. 1278, 1297 (1973); *Batek v. Curators of Univ. of Missouri*, 920 S.W.2d 895, 898 (Mo. banc 1996); State *ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 135 (Mo. banc 1995). Fundamental rights include the rights to free speech, to vote, to freedom of interstate travel, as well as other basic liberties. *Casualty Reciprocal Exchange*, 956 S.W.2d at 256. R.W. here specifically asserts that SORA interferes with his fundamental right to privacy and also complains of the burden SORA imposes on him to report in person every 90 days to the chief law enforcement officer of his county.

The right to privacy encompasses only personal information and not information readily available to the public. *State v. Williams*, 728 N.E.2d 342, 356 (Ohio 2000) (citing *Whalen v. Roe* 97 S. Ct. 869, 876 (1977)). R.W.'s right to privacy is not implicated by SORA because it does not disclose information that is not already public. Registrants' names, addresses, and

crimes are already a matter of public record. Courts have routinely upheld sex offender registration laws against right to privacy challenges. *E.g.*, *Russell v. Gregoire*, 124 F.3d 1079, 1094 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1191 (1998); *Corbin v. Chitwood*, 145 F. Supp. 2d 92, 101 (D. Me. 2001); *Akella v. Michigan Dep't of State Police*, 67 F. Supp. 2d 716, 728-29 (E.D. Mich. 1999); *Martinez v. Commonwealth*, 72 S.W.3d 581, 585 (Ky. 2002); *People v. Malchow*, 739 N.E.2d 433, 441 (Ill. 2000); *Williams*, 728 N.E.2d at 356; *In re Wentworth*, 651 N.W.2d 773, 778 (Mich. App. 2002).

R.W.'s crime is a matter of public record even though he successfully completed his probation from a suspended imposition of sentence and the official records relating to his crime are no longer accessible to the public under §§ 610.105 and 610.120. His victim and his victim's family know of the crime. Contemporary news accounts are still available. Law enforcement officials are aware of the crime and are not barred from speaking of it. *State ex rel. Thurman v. Franklin*, 810 S.W.2d 694, 699-700 (Mo. App. S.D. 1991). Sections 610.105 and 610.120 do not "close the memories of persons who have personal knowledge." *Id.* at 700. Even the official records would have been available during R.W.'s probationary period. § 610.105 ("If . . . imposition of sentence is suspended . . ., official records pertaining to the case shall thereafter be closed records *when such case is finally terminated* . . . .") (emphasis added). Although the official records may now be closed, the crime itself is still part of the public's knowledge.

Moreover, even under § 610.105, "the court's judgment or order or the final action taken by the prosecutor in such matters may be accessed." Under SORA, only the name of the

crime for which the offender must register is publicly accessible. § 589.417.2. That is no more information than what would be included in the court's judgment.

Even active dissemination of sex offender information by the government does not infringe the right to privacy. "Active distribution, as opposed to keeping open the doors to government information, is a distinction without significant meaning. The information at issue is a public record, and its characteristic as such does not change depending upon how the public gains access to it." *Williams*, 728 N.E.2d at 356.

There is also no violation of the right to privacy due to the compilation of information under SORA that would not otherwise be collected in one place for public dissemination. *See A.A. v. New Jersey*, 341 F.3d 206, 213 (3d cir. 2003) (rejecting breach of privacy argument based on the state's compilation in a sex offender registry of information, such as names, addresses, ages, and descriptive characteristics, that is available to the public, but in scattered locations).

Not only does the availability of information comport with due process, but so does the requirement that R.W. register in person every 90 days. That requirement does not involve a fundamental right. Even assuming that this complaint involves some sort of restriction on a right to personal freedom, and that such a right is sufficiently specific to constitute a fundamental right, SORA's registration obligations do not amount to such an interference with personal freedom that substantive due process protections are triggered. *In re: W.M.*, 851 A.2d 431, 450 (D.C. Ct. App. 2004). As the court in *W.M.* noted, "[r]egistrants [under the D.C. sex offender registration act] are not prevented, for example, from changing their personal

appearance, or from residing, working, attending school, or traveling wherever, whenever and with whomever they wish. They remain able to go about their daily lives and exercise their rights unimpeded." *Id.* The same is true of Missouri's SORA. Providing the information required under SORA is no more onerous than any number of other common activities of every day life, such as filling out credit applications, warranty cards, or even sweepstakes entries. The submission of fingerprints and photographs is no more onerous than what many go through when applying for or obtaining employment. Neither is regular reporting to the sheriff's department unduly onerous. Regular appearances are already a common part of modern life, such as for example licensing of automobiles. Because the SORA requirements are not any more burdensome than other obligations that people face every day, they do not interfere with any right of personal freedom.

SORA rationally related to a legitimate state purpose. Because SORA neither burdens a suspect class nor impinges on a fundamental right, it need only be "rationally related to a legitimate state purpose."[2] *Casualty Reciprocal Exchange*, 956 S.W.3d at 257.

Although SORA contains no express statement of purpose, its patent intent is to provide information to law enforcement officers to assist them in investigating future crimes and to provide information to members of the public so they can take steps to protect themselves and their children. *See, e.g., J.S. v. Beaird* 28 S.W.3d 875, 876 (Mo. banc 2000) (finding the

[2]Even if strict scrutiny did apply, SORA would still be constitutional because it is narrowly tailored to meet a compelling state interest. *See State v. Mount*, 78 P.3d 829, 842 (Mont. 2003).

"obvious legislative intent" behind SORA to be the "protect[ion] of children at the hands of sex offenders"); *Moore v. Avoyelles Correctional Center*, 253 F.3d 870, 872-73 (5th Cir. 2001) (finding sex offender notification law's intent of alerting the community to the presence of sex offenders and of assisting the community to protect itself under the guidance of law enforcement); *Russell v. Gregoire*, 124 F.3d 1079, 1090-91 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1191 (1998); *Doe v. Pataki*, 120 F.3d 1263, 1277 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1066 (1998). These purposes behind SORA are a legitimate ones.

SORA is also rationally related to these legitimate purposes. A registry of offenders will assist law enforcement officers in their investigations of crimes. Public notification that convicted sex offenders are living in the community will also assist citizens in taking whatever precautions the think necessary when they or their children are around registrants. Courts in other jurisdictions have routinely concluded that sex offender registration and notification statutes are rationally related to legitimate state interests. *See, e.g., Cutshall v. Sundquist*, 193 F.3d 466, 482 (6th Cir. 1999); *In re: W.M.*, 851 A.2d 431, 451 (D.C. Ct. App. 2004); *In re Ronnie A.*, 585 S.E.2d 311, 312 (S.C. 2003); *In re M.A.H.*, 20 S.W.3d 860, 865-65 (Tex. Ct. App. 2000); *Boutin v. LeFleur*, 591 N.W.2d 711, 718 (Minn 1999). *See also Smith v. Doe*, 123 S. Ct. 1140, 1152-54 (2003) (finding Alaska's comparable sex offender registration law reasonable means to meet legitimate state purpose in an *Ex post facto* inquiry).

Because SORA's requirements are rationally related to legitimate state interests, it does not infringe on R.W.'s right to substantive due process.

ARGUMENT II

The Sex Offender Registration Act is not an impermissible *ex post facto* law because its registration obligations are regulatory and not punitive.

The United States Constitution, art. I, §10, cl. 1, bars states from passing any *ex post facto* law. Similarly, the Missouri Constitution, art. I, § 13, provides that "no *ex post facto* . . . can be enacted. R.W. recognizes that the United States Supreme Court recently upheld Alaska's sex offender registration law against a challenge that it was an impermissible *ex post facto* law. *Smith v. Doe*, 123 S. Ct. 1140 (2003). R.W., however, asserts that, unlike Alaska's law, Missouri's SORA does impose punishment that would be barred by the prohibition on *ex post facto* laws. Despite R.W.'s assertions to the contrary, Missouri's SORA is not significantly different from Alaska's and is equally consistent with both the federal and the Missouri constitutions' *ex post facto* prohibitions.

A law violates the *ex post facto* clause of the Constitution only if it imposes a punishment for an act that was not punishable at the time it occurred or imposes punishment in addition to that then prescribed. *Weaver v. Graham*, 101 S. Ct. 960, 964 (1981). A statute is evaluated by first determining if the legislature intended that it be a punishment. *United States v. Ward*, 100 S. Ct. 2636, 2641 (1980). If the legislature's purpose is not to punish, courts will uphold the law unless "a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Kansas v. Hendricks*, 117 S. Ct. 2072, 2082 (1997) (quoting *Ward*, 448 S. Ct. at 2641).

SORA not intended to be punitive. Sex offender registration has not traditionally been regarded as punishment. *Lambert v. California*, 355 U.S. 225, 229 (1957). And nothing in Missouri's SORA places it outside this tradition. It imposes no restraint on registrants. On the contrary, although SORA contains no express statement of intent, its patent intent is to provide information to law enforcement officers to assist them in investigating future crimes and to provide information to members of the public so they can take steps to protect themselves and their children. *See, e.g., Moore v. Avoyelles Correctional Center*, 253 F.3d 870, 872-73 (5th Cir. 2001) (finding sex offender notification law's intent of alerting the community to the presence of sex offenders and of assisting the community to protect itself under the guidance of law enforcement to evince a non-punitive intent); *Russell v. Gregoire*, 124 F.3d 1079, 1090-91 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1191 (1998); *Doe v. Pataki*, 120 F.3d 1263, 1277 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1066 (1998). *See also Femedeer v. Haun*, 227 F.3d 1244, 1249 (10th Cir. 2000) (sex offender notification law permitting internet posting found "on its face" to establish a civil remedy). Moreover, the Supreme Court of Missouri has found the "obvious legislative intent" behind SORA to be the "protect[ion] of children at the hands of sex offenders." *J.S. v. Beaird* 28 S.W.3d 875, 876 (Mo. banc 2000).

The regulatory and non-punitive intent behind SORA can also be divined from the circumstances leading to its enactment. In 1994, the United States Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act. 42 U.S.C. § 14071. This law required states to enact their own sex offender registration laws

within three years or lose 10% of the funds that would otherwise be allocated to the state under 42 U.S.C. § 3756. § 14071 (a)(1) and (f). The purpose of this law was to protect children from violence and sex offenses. H.R. Rep. No. 392, 103d Cong., 1st Sess., "Need for State registration programs" section (1993). In 1996, the release of information portion of the Jacob Wetterling Act was amended by the enactment of Megan's Law to explicitly require states to release relevant sex offender registration information "that is necessary to protect the public concerning a specific person required to register . . . ." § 14071(e) (formerly subdivision (d)). As evident from the phrasing of the amendment, its purpose is "to protect the public." *See also* H.R. Rep. No. 555, 104th Cong., 2d Sess., "Agency Views" section (1996), *reprinted in* 1996 U.S. Code Cong. & Admin. News 980. Although Missouri's SORA does not include a statement of its intent, it is apparent that it was adopted with the encouragement of the Jacob Wetterling Act and the federal Megan's Law. Considering the federal impetus for the Missouri law, it is appropriate to conclude that the purpose of the Missouri law is the same as the avowed non-punitive purpose of the federal laws.

R.W. asserts that the mere placement of SORA in the Crime and Punishment section of the Revised Statutes of Missouri distinguishes it from Alaska's sex offender registration law and demonstrates that Missouri's legislature intended it as punitive measure. While R.W. is correct that the notification provisions of Alaska's statute were codified in the state's Health, Safety, and Housing Code, its registration provisions were codified in Alaska's criminal procedure code. *See* Alaska Stat. §§ 12.63.010 to 12.63.100 and 18.65.087 (included in the Appendix to this Brief). Despite placement of part of Alaska's law in the criminal

procedure code, the Supreme Court in still found that that law was not intended to be punitive. *Smith v. Doe*, 123 S. Ct. at 1148. *See also Cutshall v. Sundquist*, 193 F.3d 466, 474 (6th Cir. 1999) (rejecting argument that placement of Tennessee's sex offender law with criminal laws showed its intent to be punitive), *cert. denied*, 120 S. Ct. 1554 (2000). Neither does codification of Missouri's SORA in the Crime and Punishment section of the Revised Statutes indicate that it is intended to be punitive.

R.W. also notes that the Supreme Court in *Smith v. Doe* concluded that Alaska's law was intended to be civil rather than punitive because that statute itself mandated no procedures aside from the duty to register itself and granted authority to the Alaska Department of Public Safety to promulgate implementing regulations. This observation, however, is of no benefit to R.W.'s claim. Missouri's SORA sets out few, if any, obligations that Alaska's statute does not. *Compare* §§ 589.400 to 589.425, RSMo, *with* Alaska Stat. §§ 12.63.010 to 12.63.100 and 18.65.087. The obligations imposed upon sex offenders by Missouri's statute do not imply a punitive intent any more than do those of Alaska's statute.

The plain intent of SORA, as demonstrated by its requirements, is regulatory, not punitive. As the court stated in *Lanni v. Engler*, 994 F. Supp. 849, 853 (E.D. Mich. 1998), about Michigan's sex offender law in determining its intent to be regulatory despite the absence of a statement of legislative purpose: "Neither notification or registration inflicts suffering, disability, or restraint on the registered sex offender. It does nothing more than create a method for easier public access to compiled information that is otherwise available to the public through tedious research in criminal court files."

Effect of SORA not punitive. Once the intent of the law is found to be non-punitive, the plaintiff then bears the burden of proving by the clearest proof that the effect of law at issue is so punitive as to overcome its intent. *Hendricks*, 117 S. Ct. at 2082. To evaluate the punitive effect of laws in an *ex post facto* analysis, these factors set out in *Kennedy v. Mendoza-Martinez*, 83 S. Ct. 554, 567-68 (1963), are useful guides:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purposes assigned . . . .

See, e.g., Smith v. Doe, 123 S. Ct. at 1149. To prove that a law intended as civil actually imposes punishment is a "heavy burden." *Hendricks*, 117 S. Ct. at 2082.

R.W. makes arguments with regard to only one of these factors – whether the sanction involves an affirmative disability or restraint. First, he asserts, at page 47 of his Brief, that Alaska's sex offender law does not require personal appearances to register while Missouri's SORA requires him, as an offender whose crime involved a victim under the age of eighteen, to report in person to the sheriff's office every 90 days. R.W. argues that this amounts to the imposition of an affirmative disability or restraint and therefore renders SORA punitive in effect. Appellant's Brief, at p. 48.

Actually, Alaska's law does require a personal appearance when initially registering. Alaska Stat. § 12.63.010(b). R.W. is correct that the obligation to periodically verify registry information in Alaska may be fulfilled by written notice, Alaska Stat. § 12.63.010(d), but that

is a minor distinction that does not render Missouri's SORA punitive in effect. As pointed out in *Femedeer v. Haun*, 227 F.3d 1244, 1250 (10th Cir. 2000), registrants are not subject to any disabilities or restraints traditionally associated with punishment and are not prevented from coming and going as they please or seeking whatever employment they desired. *See also Cutshall*, 193 F.3d 474-75 (neither registration nor notification provisions restrain activities of registrants). The obligation to go in person to the sheriff's office every 90 days is not sufficiently severe to transform an otherwise non-punitive measure into a punitive one. *Doe v. Pataki*, 120 F.3d 1263, 1285 (2d Cir. 1997) (evaluation of New York's requirement to register in person every 90 days for a minimum of 10 years), *cert. denied*, 118 S. Ct. 1066 (1998).

The second affirmative disability or restraint that R.W. attributes to Missouri's SORA is that its application to offenders who have successfully completed suspended impositions of sentence will remove the records of their criminal offenses from the protection of the closed record provision of § 610.105 and thereby remove their shield from public knowledge of their crimes. Appellant's Brief, at pp. 48-49. He points out that the decision in *Smith v. Doe* was premised in part on the information about offenders' convictions already being matters of public record. *Id.* at p. 49, *citing Smith v. Doe*, 123 S. Ct. at 1151. This argument, however, fails because, as shown in the Argument section on Point I, closure of official *records* under § 610.105 does not mean that *information* about the crimes is not still in the public domain. The victim, the victim's family, and law enforcement officials will all have personal knowledge of the crimes. Contemporary news accounts still exist. Even under

§ 610.105, the official records are available during the probationary period of an offender's suspended imposition of sentence, and the court's judgment or order remains open after completion of the probationary period. Thus, the crimes of R.W. and other offenders who received suspended impositions of sentence are matters of public knowledge. The closure of the official records of these crimes does not distinguish these offenders from other SORA registrants and does not merit their exemption from its obligations.

Further, as the Supreme Court observed in *Collins v. Youngblood*, 110 S. Ct. 2715, 2723 (1990), the *Ex Post Facto* Clause should not be read to proscribe a law merely because it alters the situation of a party to his disadvantage. More onerous burdens than those imposed by SORA have been found not to rise to affirmative disabilities or restraints. *See Hudson v. United States*, 118 S. Ct. 488, 496 (1997) (payment of fine and indefinite ban on working in the banking industry not affirmative disability or restraint); *Herbert v. Billy*, 160 F.3d 1131, 1137 (6th Cir. 1998) (suspension of driver's license for driving under the influence not an affirmative disability).

R.W. has not carried his "heavy burden" of showing that SORA is punitive in effect. *See Hendricks*, 117 S. Ct. at 2082.

SORA Consistent with Missouri's *Ex Post Facto* Prohibition. "The Missouri Constitutional provision against *ex post facto* laws is more limited than the more general provision of the United States Constitution." *State ex rel. Nixon v. Taylor*, 25 S.W.3d 566, 568 (Mo. App. W.D. 2000). Because SORA does not violate the federal prohibition on *ex post*

facto laws, neither does it violate the more limited *ex post facto* prohibition of the Missouri Constitution.

Summary. Neither the intent nor the effect of SORA is punitive. Because it is not punishment, it does not violate the constitutional prohibition on *ex post facto* laws. *Weaver v. Graham*, 101 S. Ct. 960, 964 (1981).

ARGUMENT III

The Sex Offender Registration Act is not an impermissible retrospective law because SORA does not impair any vested rights or prejudice any person for past transactions in that it the governs only those actions that occur after its enactment

The Missouri Constitution, art. I, § 13, provides that "no . . . law . . . retrospective in operation . . . can be enacted." This constitutional prohibition on retrospective laws applies when the law at issue impairs some vested right or affects past transactions to the substantial prejudice of a person. *La-Z-Boy Chair Co. v. Director of Economic Dev.*, 983 S.W.2d 523, 525 (Mo. banc 1999). A vested right is one guaranteed by "a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another." *Fisher v. Reorganized School Dist. No. R-V*, 567 S.W.2d 647, 649 (Mo. banc 1978) (quoting *People ex rel. Eitel v. Lindheimer*, 21 N.E.2d 318, 321 (Ill. 1939)). But a vested right is something more than a mere expectation based on a supposed continuation of past law. *Fisher*, 567 S.W.2d at 649. Additionally, a "statute is not retrospective or retroactive . . . because it relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixes the status of an entity for the purpose of its operation." *Jerry-Russell Bliss, Inc., v. Hazardous Waste Mgt. Comm'n*, 702 S.W.2d 77, 81 (Mo. banc 1985).

SORA applies to certain offenders because of their past convictions of sex offenses. This application, however, neither deprives them of any vested right nor imposes upon them

any new obligation based on a past event to their substantial prejudice. All they are required to do is provide certain information to the sheriff and then report to the sheriff periodically thereafter.[3] Registrants are not harmed in any way. They are denied no income or employment. They are deprived of no benefit otherwise available to them. They are not prevented from moving about or from changing their domicile or from associating with whomever they choose.

SORA simply fixes the status of persons to whom it applies based on their past criminal record. A statute may use antecedent facts to establish the status of those to whom it applies. *Jerry-Russell Bliss*, 702 S.W.2d at 81; *State ex rel. Sweezer v. Green*, 232 S.W.2d 897, 901 (Mo. banc 1950) (upholding application of Missouri's criminal sexual psychopath law, which permitted civil commitment of those found to be criminal sexual psychopaths, to a person whose alleged sexual offenses occurred before the effective date of the law), *disapproved with regard to an unrelated issue*, *State v. Kirtley*, 327 S.W.2d 166, 168 (Mo. banc 1959); *Barbieri v. Morris*, 315 S.W.2d 711, 714-15 (Mo. 1958) (upholding suspension of driver's license on grounds that driver was "habitual violator of traffic laws" despite three of the four traffic violations upon which the suspension was based occurring before effective date of law under which suspension was imposed). SORA's impact is not materially different from that

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[3]Even the requirement of some registrants to appear in person at the sheriff's office every 90 days is not an obligation that is prejudicial. This obligation is far less burdensome than the economic requirement of most people to appear at their workplace on five days out of seven.

of laws applying to criminal sexual psychopaths and habitual traffic violators that have been upheld in the face of challenges under the Missouri Constitution's prohibition on retrospective laws.

SORA is analogous to 18 U.S.C. §922(g), the federal statute governing possession of firearms by felons. This statute provides that it is unlawful for any person who has been convicted of a crime punishable by imprisonment for a term of more than one year to possess any firearm or ammunition that has traveled in interstate commerce. Section 922(g) has been unsuccessfully challenged as retrospective and *ex post facto* by individuals prosecuted under it based on underlying offenses that occurred before the enactment of the statute. *E.g., United States v. Mitchell*, 209 F.3d 319, 322-23 (4th Cir. 2000) (citing cases). In *National Ass'n of Government Employees, Inc. v. Barrett*, 968 F. Supp. 1564, 1575-76 (N.D. Ga. 1997), *aff'd*, 155 F.3d 1276 (11th Cir.1998), plaintiffs who were barred from carrying firearms after the enactment of §922(g) for convictions that occurred before the prohibition, also challenged the constitutionality of §922(g) on the ground that it was impermissibly retrospective and therefore an *ex post facto* law. The court held that §922(g) was not retrospective, quoting the following from *United States v. Brady*, 26 F.3d 282, 291 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 246 (1994):

> Regardless of the date of [defendant's] prior conviction, the crime of being a felon in possession of a firearm was not committed until after the effective date of the statute. . . . [B]y [the date of defendant's conviction under § 922(g)(1), defendant] had more than adequate notice that it was illegal for him to possess

> a firearm because of his status as a convicted felon, and he could have conformed his conduct to the requirements of the law.

968 F. Supp. at 1576. The conduct regulated by § 922(g) is thus forward looking, based on the status of the offender, and not retrospective. It is the future gun possession that is prohibited. SORA is also forward looking. SORA applies if the offender has been convicted of certain predicate offenses, yet the conduct regulated all occurs after the enactment of the statute. Offenders are required to register and can be convicted of the crime of not registering, but they have ample notice of their obligations and time to fulfill them. The obligation to register and the consequence of not doing so are transactions controlled by the statute, not the underlying offense.

On this point, too, R.W. raises the argument that SORA's application to those, like him, who have received a suspended imposition of sentence and have successfully completed their probation, renders SORA invalid, at least when applied in this instance. Here, his point is that offenders who have completed their obligations under a suspended imposition of sentence have a vested right, based on more than just an expectation of continuation of past law, to continued closure of their records under § 610.105 and the opening of these records impairs their right to freely associate. Because vested rights are impaired based on past actions, sex offenses occurring before SORA was enacted, requiring those who have received suspended impositions of sentence for such offenses to register violates the retrospective law prohibition of the Missouri Constitution, he argues. His argument fails, however, because its premise that SORA opens records closed by statute is invalid. SORA does not open records closed by § 610.105.

SORA does obligate R.W. to report his prior offense, but that is a report based on his personal knowledge, not the official record. This is not a spurious distinction that can be considered a "back door" method of opening otherwise closed information. Once again, as shown in the Argument section on Point I, closure of official *records* under § 610.105 does not mean that *information* about the crimes is not still in the public domain. People's memories are not closed. News accounts will still exist. The official records are not closed until the case is finally terminated and, even then, the court's judgment or order remains open under § 610.105. Therefore registration under SORA does not withdraw any right offenders have under that statute.

SORA governs only those actions that occur after its enactment and does not impair any vested rights or prejudice any person for past transactions. Thus, SORA is not a retrospective law.

CONCLUSION

For the foregoing reasons, the State of Missouri urges this Court to affirm the judgment of the Jackson County Circuit Court upholding the constitutionality of SORA.

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CERTIFICATE OF SERVICE

AND OF COMPLIANCE WITH RULE 84.06(b) AND (c)

I hereby certify that one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, this 29th day of September, 2004, to:

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I also certify that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 6552 words, excluding the Table of Contents and the Table of Authorities.

I further certify that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses, and is virus-free.

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Assistant Attorney General

APPENDIX

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